Supreme Court, U.S.
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No. 99-89

In the Supreme Court of the United States

ROBERT BOGAN AND SCOTT BOGAN,

Petitioners,

v.

AUSTIN E. HODGKINS, JR.,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

BRIEF FOR THE RESPONDENTS IN OPPOSITION

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QUESTIONS PRESENTED

Respondent, a general agent of the Northwestern Mutual Life Insurance Company (NML), allegedly agreed with other NML general agents not to hire away each other's subagents without prior permission, thus protecting the NML general agents' investments in the subagents' training, and in turn promoting interbrand competition in the overall market for insurance. Petitioners, two NML subagents, conceded that they would lose their antitrust suit against respondent under the rule of reason.

The following questions are presented:

1. Did the court of appeals correctly refuse to expand the limited universe of activity deemed illegal *per se* and thus correctly uphold this procompetitive policy under the rule of reason?

2. Given the policy's procompetitive aspects, did the court correctly hold that the policy was legal even under the "quick look" rule of reason?

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BRIEF FOR THE RESPONDENTS IN OPPOSITION

This is a request by petitioners that the Court create a new category of conduct deemed illegal *per se* under the Sherman Act, 15 U.S.C. § 1 — even though the conduct at issue here not only is not the sort of "manifestly anticompetitive" conduct for which *per se* treatment may be appropriate (*Business Electronics Corp.* v. *Sharp Electronics Corp.*, 485 U.S. 717, 723 (1977)), but instead actually *fosters* competition among sellers of insurance. Rejecting petitioners' request, the Second Circuit held that the challenged conduct was properly assessed under the rule of reason, and it affirmed summary judgment for respondent given petitioners' concession that under the rule of reason they would lose. Despite petitioners' (and amici's) rote incantations of the standards of this Court's Rule 10, the Second Circuit's decision was correct on the merits and conflicts with no decision of this Court or of any other court of appeals. The petition should be denied.

STATEMENT

Petitioners devote most of their statement to spinning the facts of what the district court called "[petitioners'] rather confusing claim" (Pet. App. 29a). Most of petitioners' statement is simply irrelevant to the petition, however, not to mention at odds with the facts found undisputed by the district court in entering summary judgment for respondent. In any event, the relevant facts are set out fully in the opinion of the court of appeals affirming the judgment for respondent (Pet. App. 1a-17a), and respondent adds only the following corrections to petitioners' statement.

First, the alleged "no-switching agreement" at issue here is not, as petitioners suggest (at 3-5), solely — or even mostly — horizontal in nature. The court of appeals held that for the purposes of deciding the appeal it would treat the alleged agreement as if it were entirely horizontal, but only because it held that petitioners would lose no matter how the policy was characterized. Pet. App. 10a. In fact, respondent

introduced substantial proof that the policy at issue was vertical in nature, as the district court held. See Pet. App. 41a-46a (detailing what the court viewed as the "strong vertical aspects to the alleged combination" (at 45a)). For example, the written policy, which was drafted by the Northwestern Mutual Life Insurance Company (NML), states in its first paragraph:

> Our first objective is to operate in the best interests of the Company and its General Agency system. * * * [T]he Company and the General Agents have to protect investments of time, energy and money in the recruitment, training, development and support of agents and in the General Agency system. Therefore, we need to operate within certain guidelines to provide a modicum of structure and some basic "rules of the road" with reference to transfers, especially in areas were several Agents operate within the same territory.

Pet. App. 28a n.6. As one NML officer explained in an uncontradicted affidavit, it had long been NML's policy to refuse the transfer of subagents between general agencies in shared territories (such as the New York metropolitan region). To the extent that general agents try to violate the policy, NML enforces it. In this very case, for instance, petitioner Robert Bogan signed a contract with another general agent after being terminated him for cause, but NML refused to approve the new contract. See Pet. App. 43a. Thus, nonparty NML — not respondent Hodgkins — caused petitioner not to be contracted with Hodgkins' alleged competitor.

Second, petitioners' "history of the litigation" (Pet. 11) is both inaccurate and incomplete. The Second Circuit obviously did not "reverse" the district court's decision (*ibid.*). The court of appeals affirmed the district court's grant of summary judgment to respondent (Pet. App. 17a), holding that there was an issue of fact as to whether the alleged agreement is vertical or horizontal, but that petition-

ers could not prevail even if it were horizontal alone. And petitioners' nine-year crusade did not begin with this lawsuit and has not ended with this petition. Petitioners sued respondent and NML in New York state court in 1990 (see Pet. App. 9a n.5), and filed yet another state court action (after the first was dismissed), as well as another action in the Southern District of New York, just days after they filed this petition.

REASONS FOR DENYING THE PETITION

The Second Circuit correctly refused in this case to expand the universe of conduct deemed illegal *per se* under the antitrust laws and correctly held that the conduct that petitioners challenged did not fit any of the limited categories to which the *per se* rule applies. The court's decision, moreover, is consistent with all other decisions of courts of appeals addressing no-switching agreements and does not conflict with any decisions of this Court. The court also correctly applied the decisions of this Court in rejecting the application of the "quick look" rule of reason. Petitioners' case, finally, poses other problems. As a matter of law, petitioners likely could not prove that respondent and his fellow general agents could have engaged in the concerted behavior proscribed by section 1 of the Sherman Act, because the general agents are all engaged in a common enterprise; and, as the Second Circuit noted, petitioners probably lack standing to sue.

1.a. Although antitrust law provides three different modes of analyzing the competitive effects of an agreement (*per se* rule, "quick look" rule of reason, and full rule of reason), each mode has the same object: distinguishing agreements that harm competition from those that do not. See 7 PHILLIP E. AREEDA, ANTITRUST LAW ¶¶ 1508, 1511 (1986); *NCAA* v. *Board of Regents*, 468 U.S. 85, 104 n.26 (1984) ("there is often no bright line separating *per se* from Rule of Reason analysis"). Contrary to petitioners' sugges-

tion, the modes are not alternative tests allowing a plaintiff three chances to prevail, but rather varying ways for a court to approach the single question that is at the heart of all antitrust cases. Thus, this Court recently reaffirmed that "*[p]er se* treatment is appropriate '[o]nce experience with a particular kind of restraint enables the Court to predict with confidence that *the rule of reason will condemn it.*'" *State Oil Co.* v. *Khan*, 522 U.S. 3, 10 (1997) (quoting *Arizona* v. *Maricopa County Medical Society*, 457 U.S. 332, 344 (1982)) (emphasis added). Petitioners here are in the anomalous position of *conceding* that the rule of reason will *not* condemn the policy at issue in this case, yet insisting that it can be fitted within the *per se* rule. See Pet. App. 12a n.6. A unanimous panel of the Second Circuit (Judges Walker, Calabresi, and Restani) easily saw through that exercise in exalting form over substance.

The court of appeals thus rightly rejected petitioners' argument that it should add another category of conduct to those deemed illegal *per se*. This Court limits the application of the *per se* rule of illegality to "conduct that is manifestly anticompetitive, that is, conduct that would *always or almost always* tend to restrict competition and decrease output." *Business Electronics* v. *Sharp Electronics*, 485 U.S. at 723 (citations and internal quotation marks omitted; emphasis added). And because experience sometimes shows that the presumption of illegality was misplaced, this Court has not hesitated to reclassify as potentially procompetitive certain conduct once held illegal *per se*. *E.g.*, *State Oil* v. *Khan*, *supra* (holding vertical maximum price fixing subject to the rule of reason and overruling *Albrecht* v. *Herald Co.*, 390 U.S. 145 (1968)); *Continental T.V., Inc.* v. *GTE Sylvania, Inc.*, 433 U.S. 36 (1977) (holding vertical non-price restrictions subject to the rule of reason and overruling *United States* v. *Arnold, Schwinn & Co.*, 388 U.S. 365 (1967)). The point, in short, is that the rule of reason is the rule, and *per se* illegality is the exception to the rule. "Rule-of-reason

guides the inquiry [under the Sherman Act] *unless* the challenged action falls into the category of agreements or practices which because of their pernicious effect on competition and lack of any redeeming virtue are conclusively presumed to be unreasonable." *Northwest Wholesale Stationers, Inc.* v. *Pacific Stationery & Printing Co.*, 472 U.S. 284, 289 (1985) (citation and internal quotation marks omitted; emphasis added). Thus, the Court has repeatedly "expressed reluctance to adopt *per se* rules with regard to restraints imposed in the context of business relationships where the economic import of certain practices is not immediately obvious." *Khan*, 522 U.S. at 10 (citation and internal quotation marks omitted); see *FTC* v. *Indiana Fed'n of Dentists*, 476 U.S. 447, 458-459 (1986) (warning against the "indiscriminate[ ]" expansion of types of restraints classified as *per se* illegal group boycotts).

Examining the alleged no-switching agreement at issue here, the Second Circuit decided that the policy is not the type of restraint that is so "manifestly anticompetitive" as to warrant an exception to the application of the rule of reason and instead deserve condemnation *per se*. Pet. App. 11a (quoting *GTE Sylvania*, 433 U.S. at 49-50). The court's conclusion was indisputably correct. The policy obviously does not divide territories, since all general agents are free to compete anywhere in the New York metropolitan area, or anywhere else. Pet. App. 13a ("the record reveals no geographic * * * division"), 48a ("the alleged conspiracy * * * does not involve the establishment of exclusive territories"). The policy just as obviously does not divide the market of buyers of insurance. Pet. App. 13a. Nor does it "allocate the market for agents to any meaningful extent" (*ibid.*), given that it does permit subagents to transfer and that the market of potential subagents is not limited to subagents already selling on behalf of NML.

Having held that the alleged no-switching agreement is not like a territorial or other market allocation, the court of

appeals then rightly held that the policy does not constitute a *per se* illegal "group boycott." The court noted that not all activity that might be called a "group boycott" necessarily comes under the *per se* rule. *Ibid.* (citing *Northwest Wholesale Stationers*, 472 U.S. at 298); see *NYNEX Corp.* v. *Discon, Inc.*, 119 S. Ct. 493, 497 (1999). Rather, the Second Circuit held, the "classic" type of group boycott deemed illegal *per se* is "interfirm," or interbrand, "'limited to cases in which firms with market power boycott suppliers or customers to discourage them from doing business with a competitor.'" Pet. App. 12a (quoting *Indiana Fed'n of Dentists*, 476 U.S. at 458), 14a; see *NYNEX* v. *Discon*, 119 S. Ct. at 498 ("precedent limits the *per se* rule in the boycott context to cases involving horizontal agreements among direct competitors"). As this Court noted just recently, "the primary purpose of the antitrust laws is to protect interbrand competition." *Khan*, 522 U.S. at 15; see also *GTE Sylvania*, 433 U.S. at 52 n.19 (calling interbrand competition "the primary concern of antitrust law"). Here, however, petitioners had accused respondent of restraining competition within a single firm or brand — a firm (NML) with only 4% of the New York insurance market (Pet App. 42a ("Nowhere do[] [petitioners] * * * suggest that NML has market power in the insurance market.")). Because the alleged agreement does not restrain competition among different firms or brands — it promotes such competition, in fact, since other insurance agencies can easily hire NML agents (as the Massachusetts Mutual Life Insurance Company hired petitioners, Pet. App. 16a) — the court of appeals held that the policy was properly analyzed under the rule of reason. Under this Court's teachings, that conclusion was correct.

b. The Second Circuit's decision not to apply a *per se* rule does not conflict with the decisions of any other courts of appeals. As far as we know, no other court of appeals has ever directly addressed the issue whether intrabrand no-switching agreements are subject to rule-of-reason analysis.

Nor have petitioners cited any cases in support of a conflict on the issue. Intrabrand agreements aside, the only courts of appeals that have considered *inter*brand no-switching agreements have concluded that the latter are not illegal *per se*. *Nichols* v. *Spencer Int'l Press, Inc.*, 371 F.2d 332 (7th Cir. 1967); *Union Circulation Co.* v. *FTC*, 241 F.2d 652 (2d Cir. 1957); see also *Consultants & Designers, Inc.* v. *Butler Serv. Group, Inc.*, 720 F.2d 1553, 1560 (11th Cir. 1983) (calling "bizarre and frivolous" the argument that a no-switching restrictive covenant in an employment agreement, honored by an employer and its competitor, might be illegal *per se*). If interbrand no-switching agreements are assessed under the rule of reason (even though they may restrain interbrand competition), it follows *a fortiori* that *intra*brand agreements must be assessed under the rule of reason as well (given that they promote interbrand competition). No court of appeals has held otherwise, which is another reason that review by this Court is unwarranted.

c. In light of this Court's skepticism toward the expansion of the presumption of *per se* illegality, it is not surprising (as a matter of strategy) that neither petitioners nor amici seriously suggest that the Court should now add a new class of conduct to the limited number it condemns *per se*. Having no plausible argument that experience demonstrates that intrabrand no-switching agreements are inevitably anticompetitive — and facing petitioners' concession that in fact the alleged agreement here was effectively *pro*competitive, since petitioners would lose under the rule of reason — petitioners and amici argue that the alleged agreement here is like ones that have already been held illegal *per se* under this Court's prior decisions. These labored attempts at relabeling are unpersuasive.

Petitioners first call the policy a "refusal to deal," or group boycott. Pet. 13. That gets petitioners nowhere. As we have explained, the Second Circuit rightly held that the *per se* rule does not apply to all concerted refusals to deal.

Pet. App. 13a. "[N]ot all concerted refusals to deal should be accorded per se treatment * * * because not all concerted refusals to deal are predominantly anticompetitive." *Northwest Wholesale Stationers*, 472 U.S. at 297-298 (footnote omitted). As the Second Circuit held, the policy challenged here (a) is intrabrand, not interbrand; and (b) has important procompetitive aspects. Pet. App. 12a n.6, 14a. It thus differs in critical respects from the boycotts that have been deemed illegal *per se* in other cases and was thus properly analyzed under the rule of reason.

Petitioners also claim that the policy "allocat[es] a market" and "split[s] the same geographic market." Pet. 14. The policy does no such thing, as the Second Circuit held, Pet. App. 13a; general agents may and do compete with one another in any market they choose. Petitioners and amici can thus find no support in *Palmer* v. *BRG of Georgia, Inc.*, 498 U.S. 46 (1990) (per curiam) (see Pet. 14-15; Amici Br. 4), and the laundry list of cases that apply the same unexceptional rule (see Pet. 16; Amici Br. 5), that an agreement to divide markets by territory is illegal *per se*. At bottom, petitioners seem to be quibbling with the Second Circuit's holding that they had "failed to show the allegedly relevant market to be a cognizable submarket" (Pet. App. 15a-17a; see Pet. 19). That fact-intensive issue, however, is plainly unworthy of review.

d. The core holding of the court of appeals here is, as the court emphasized, that an intrabrand no-switching agreement is not so manifestly anticompetitive that it should be kept outside the rule of reason and be held illegal *per se*. Petitioners' arguments in response, which total a single paragraph in the 26-page petition, as well as amici's response, are insubstantial.

Petitioners offer a passing, unexplained "see" citation (at 20) to *Big Apple BMW, Inc.* v. *BMW of North America, Inc.*, 974 F.2d 1358 (3d Cir. 1992), cert. denied, 507 U.S. 912

(1993). But that case actually supports respondent's (and the Second Circuit's) position and refutes petitioners'. The court in *Big Apple BMW* held that the alleged refusal to deal was to be assessed under the rule of reason, see *id.* at 1376, and stressed that "it is well settled that protecting interbrand, rather than intrabrand, competition should be the goal of antitrust law," *id.* at 1376 n.13. Both petitioners and amici cite *United States* v. *General Motors Corp.*, 384 U.S. 127 (1966), which did concern intrabrand competition for GM cars, but it is doubtful that there is much left to the case even without a formal acknowledgment that it has been overruled: *General Motors* involved vertical restraints that the Court has since held subject to the rule of reason. *E.g.*, *Khan*, supra (holding that vertical maximum price fixing restraints are not illegal *per se*); *NYNEX* v. *Discon*, supra (holding that the *per se* rule does not bar a decision by one firm not to deal with a supplier). In any event, *General Motors* is distinguishable; even though it had horizontal aspects as well as vertical, the restraint in *General Motors* had the effect of price fixing (see 384 U.S. at 147-148), which is plainly not the case here. The same distinctions are true of *United States* v. *Topco Associates*, 405 U.S. 596 (1972), and *United States* v. *Sealy, Inc.*, 388 U.S. 350 (1967), cited by amici (at 6). Both those cases involved the allocation of geographic markets, and this one plainly does not.

2. The court of appeals properly dismissed in a footnote petitioners' alternative argument, that respondent's conduct should have been analyzed under the "quick look" rule of reason. Pet. App. 12a n.6. As this Court explained just last Term, "[t]he object is to see whether the experience of the market has been so clear, or necessarily will be, that a confident conclusion about the principal tendency of a restriction will follow from a quick (or at least quicker) look, in place of a more sedulous one." *California Dental Ass'n* v. *FTC*, 119 S. Ct. 1604, 1618 (1999). Such an inquiry is precisely the one the Second Circuit undertook. It held that

the experience of the market was not so clear that the no-switching agreement would be always, or nearly always, anti-competitive; on the contrary, the alleged agreement had significant procompetitive aspects (efficiencies and savings by general agents in the training of subagents), which sufficed to justify the application of the full rule of reason. Pet. App. 12a n.6 (citing *NCAA*, 468 U.S. at 113 (reviewing the "proffered justifications" of procompetitive benefits of a horizontal restraint on output)).

As with their assertion that they can win under a *per se* rule a case that is concededly meritless under the full rule of reason, petitioners betray a fundamental failure to understand antitrust law. Petitioners assert that, if only the court of appeals would have engaged in *less*, rather than more, analysis, they could have won. It is the rule of reason that delves most deeply into the question whether an agreement is anticompetitive, yet petitioners concede that they cannot win under the rule of reason. Pet. App. 12a n.6. Instead, they come before this Court arguing that an agreement that cannot be condemned after thorough analysis is nevertheless so "*obviously*" anticompetitive as to justify condemnation under the "quick look" rule of reason, which applies to those agreements that are not quite familiar enough to be condemned *per se* but nevertheless can be seen to be anti-competitive "in the twinkling of an eye." *NCAA*, 468 U.S. at 109 n.39.

Petitioners' argument makes no sense. In rejecting that self-contradictory assertion, the court of appeals did just what this Court would subsequently confirm is the correct approach, and applied the "enquiry meet for the case," *California Dental*, 119 S. Ct. at 1618, that is, the standard, full rule of reason. In any event, what petitioners and amici are really complaining about is the Second Circuit's reference to respondents' "sound allegations of procompetitive benefit" (Pet. App. 12a n.6), which they say fell fatally short of a showing of "proof" (Pet. 24-25; Amici Br. 8-9). The court

of appeals' choice of word is irrelevant, however. The record is replete with evidence that the policy at issue has what the district court called "substantial procompetitive justification[s]" (Pet. App. 51a) and thus fosters interbrand competition — a point that petitioner Robert Bogan himself acknowledged during discovery (Pet. App. 51a n.19). Whether or not the evidence is sufficient or sufficiently probative is obviously not a matter that should concern this Court. Moreover, in insisting that respondent had a burden of "proof," petitioners betray a failure to understand how the quick look rule of reason works. What is necessary to take a case out of the quick look and into a full rule-of-reason analysis is merely "claim[ed] justification of the kind which a 'quick look' — usually at the arguments alone — shows to be legitimate in principle and capable of being proved satisfactorily." 7 AREEDA, *supra*, ¶ 1511, at 429; see also *United States* v. *Brown University*, 5 F.3d 658, 678 (3d Cir. 1993); *Chicago Professional Sports Ltd. Partnership* v. *National Basketball Ass'n*, 961 F.2d 667, 674 (7th Cir. 1992). The court of appeals was entirely correct in saying that respondent had met *that* standard in spades.

3. This is, finally, a poor vehicle for resolving the questions presented, even were the petition otherwise certworthy.

a. Although the Second Circuit chose not to address the issue, there is substantial doubt as to whether petitioners could even prove a Sherman Act § 1 "conspiracy." See *Copperweld Corp.* v. *Independence Tube Corp.*, 467 U.S. 752 (1984). Rather than being competitors with distinct economic interests, for the purposes of the alleged intrabrand no-switching agreement the NML general agents shared a "unity of interest" (*id.* at 771) in ensuring that their NML subagents were well trained through an efficient system. The general agents were thus incapable of the concerted activity barred by the Sherman Act. See, *e.g.*, *Oksanen* v. *Page Mem'l Hosp.*, 945 F.2d 696, 702-708 (4th

Cir. 1991) (en banc) (doctors who were independent contractors and often competed did not conspire with one another or a hospital to boycott another doctor because they shared an interest in accurate peer review), cert. denied, 502 U.S. 1074 (1992); see also *Card* v. *National Life Ins. Co.*, 603 F.2d 828, 831, 834 (10th Cir. 1979) (holding that the general agents of National Life Insurance "were really a part of the [company] structure" and so could not legally conspire with the company or each other).

b. There is also substantial doubt as to whether petitioners suffered antitrust injury and thus had standing to sue. The court of appeals suggested that they did not, though the court chose not to decide the issue in light of its disposition on the merits. See Pet. App. 16a n.7 (noting that "[petitioners'] submarket definition [of a submarket of NML subagents] is inconsistent with their claim to antitrust injury"; "any alleged conspiracy by General Agents to restrict intra-NML transfers would only *encourage* other insurers' entry into a hypothetically distinct market for experienced NML agents, increasing competition"). Given that petitioners likely did not have antitrust standing in the first place, petitioners still would have lost.

* * * * *

In the final analysis, this case is not like one in which a group of law firms in New York City agree not to lure away each other's associates, as petitioners would have it (Pet. 18). It is, rather, like a case in which certain associates working for a single law firm are assigned to a single partner, and the partners in the firm agree not to steal each other's associates to work for them. There can be no doubt that this type of agreement — though it may restrain the mobility within that single firm of that firm's associates — is an efficient way to train a firm's associates, and thus foster competition among law firms in general and ultimately provide consumers with more and better choices among different "brands" of law-

yers. A procompetitive agreement of that kind is surely not illegal *per se*.

Even if the legal profession worked slightly differently, and partners in law firms uniformly relied on independent contractors rather than associates to do their work, it is entirely obvious that agreements among the partners of a single firm not to poach on each other's contractors would lack the characteristics of a *per se* illegal agreement. Petitioners do not contend otherwise, but instead insist on analogizing this case to one involving *interbrand* competition. This case, however, involves only Northwestern Mutual Life agents, and thus petitioners' analogy fails, as the court of appeals correctly understood. The court's analysis was sound and wholly consistent with the decisions of this Court.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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PETITIONERS' REPLY MEMORANDUM

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MISCELLANEOUS

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INTRODUCTION

Respondent and his horizontal conspirators agreed not to compete in price or any other way for petitioners' services in order to insure that their system "*is not torn apart by cutthroat competition for agent services*," H. Br. on Appeal, p. 41 n.15 (emph. added), and he used this anticompetitive agreement to threaten petitioners: "You can either work for me or get out of the business" (A784). To disguise that this is classic anticompetitive conduct at issue, respondent, like the Second Circuit, turns core antitrust principles on their head; seeks to overrule *United States v. General Motors Corp.*, 384 U.S. 127 (1966), and *United States v. Topco Associates, Inc.*, 405 U.S. 596 (1972); and attempts to minimize the important conflicts with *Palmer v. BRG of Georgia, Inc.*, 498 U.S. 46 (1990), *per curiam rev'g* 874 F.2d 1417 (11th Cir. 1989), *on reh'g*, 893 F.2d 293 (11th Cir. 1990), and decisions of several circuits.

Respondent's misstatement of core antitrust doctrine demonstrates the importance and substantiality of the questions presented to public and private enforcement of the antitrust laws. This importance has been shown by the amici. We respectfully suggest that any doubt about this importance and the doctrinal conflict created by the opinion below may be removed by requesting the views of the United States.

STATEMENT

The court below agreed that on summary judgment it is necessary to accept petitioners' extensive proof of repeated written and oral statements by general agents and NML that the agreement not to compete was horizontal, made by and among the general agents, thus not an agreement created by NML. a5-6.[1] NML viewed its role only as an arbitrator.[2] a6. Respon-

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[1]Shortly before petitioners' terminations, NML wrote that this was an agreement "between the General Agents." A 1582.

dent's attempt to create a false factual issue does not deflect from the importance of the legal issue presented. Respondent also attempts to confuse the market to purchase agent services with the market to sell insurance. (at 8). While general agents can compete anywhere *to sell* insurance, they restrict themselves from competing anywhere in the restrained purchasing market at issue; that is, they cannot hire/compete within another agency to hire subagents.[3] *Chicago Pro. Sports Ltd. Partnership v. NBA*, 961 F.2d 667, 674 (7th Cir.), *cert. denied*, 506 U.S. 954 (1992); *Sullivan v. NFL*, 34 F.3d 1091, 1103 (1st Cir. 1994), *cert. denied*, 513 U.S. 1190 (1995).

I. THE PER SE STANDARD

No matter how hard respondent strains to avoid it, and the court below never honestly addressed it, this is a classic account splitting case, which has the same purpose and effect as bid-rigging. Rather than fix the price, the competitors refuse to bid at all, leaving one to claim the account. Competitors who split accounts are routinely criminally prosecuted by the United States. It is irrelevant that all bidders do not conspire, or that the victim has other choices or cannot prove an effect on price or competition and thus would lose if the full blown rule of reason rather than the *per se* standard were to apply.

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[2]The court below did not say, as respondent claims (at 1), that it would treat the agreement as horizontal "only because" it did not matter, but rather because the district court's contrary conclusion on summary judgment "was error." a10.

[3]Respondent refers to petitioners filing a new case. (at 3). After the antitrust claims were dismissed, the state law claims were dismissed without prejudice on jurisdictional grounds. Petitioners were required to file a new complaint to prevent the statute of limitations running before this petition is decided.

This case involves basic principles which this Court and the circuits have repeatedly upheld as to *horizontal* conduct by competitors: (1) agreements to split accounts even without geographic divisions or where the supplier has other options are *per se* illegal; (2) intrabrand competition does not save conduct from the *per se* standard. The reasons advanced for radically overturning these accepted principles are without merit.

1. Respondent argues that because there are few cases of agreements prohibiting independent contractors from switching, applying the *per se* standard would add a new category of conduct to those deemed illegal *per se*.[4] This rote response to an invocation of the *per se* standard is without merit. This Court's vast experience with the usually pernicious effect of account or supplier allocation conspiracies has been sufficient to conclude that the *per se* rule should apply even where there will be or can be no proof in a particular allocation case of any effect on the market price.[5] Each time a new type of horizontal allocation or a new industry presents itself, it is unnecessary for the

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[4]These restraints are not alien to this Court, which long ago struck down an employers' agreement not to compete for labor except on terms to which the employers alone agreed. *Anderson v. Shipowners' Ass'n*, 272 U.S. 359 (1926).

[5]Respondent's various assertions that petitioners are ineligible for the *per se* standard because they acknowledge they cannot prevail under a full blown rule of reason is a red herring that contradicts accepted antitrust doctrine. The purpose of the *per se* standard is to dispense with proof of market power or anticompetitive effect or intent. Petitioners have only acknowledged, as is true in most *per se* cases, that they cannot mount the expensive, difficult economic proof otherwise required.

Court to reinvent the wheel to determine whether the *per se* rule applies or to create a "new category."[6]

The simple issue is whether respondent's conspiracy was a supplier allocation. Respondent ignores this in the same facile way the court below did and just asserts this is not a supplier allocation. Such *ipse dixit* declarations cannot change the economic facts. It was undisputed that each general agent was a horizontal competitor for hiring subagents, and each agreed not to compete in price or otherwise for the subagents at another's agency. By definition, this is *account allocation* of supplies, not sales. Each subagent was allocated to the general agent currently using him. Every allocation conspiracy employs some method to allocate accounts. That the conspiracy allocates based on old versus new agents, zip codes, addresses, or last names does not make it a "new category."[7]

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[6]"[T]he argument that the *per se* rule must be rejustified for every industry that has not been subject to significant antitrust litigation ignores the rationale for the *per se* rules," which is to avoid complicated economic investigation into whether a particular restraint in a specific industry is unreasonable. *Arizona v. Maricopa County Medical Soc.*, 457 U.S. 332, 351 (1982); *N.C.A.A. v. Bd. of Regents*, 468 U.S. 85, 100 and n. 21 (1984).

[7]Respondent cites 3 no-switching agent cases to support the rule of reason. *Union Circulation Co. v. FTC*, 241 F.2d 652 (2d Cir. 1957), was decided before *Klor's Inc. v. Broadway-Hale Stores, Inc.*, 359 U.S. 207 (1959), and *United States v. Topco Associates, Inc., supra*, held the *per se* rule applies to concerted refusals to deal. *Union* merely affirmed the F.T.C., which had used the rule of reason; the *per se* rule was not litigated. *Nichols v. Spencer Int'l Press, Inc.*, 371 F.2d 332 (7th Cir. 1967), was decided before *Topco*, relied on *Union*, and did not discuss Section 1, refusal to deal cases, or the *per se* rule. It reversed summary judgment obtained on theories not

2. Respondent argues that general agents can still compete with one another in any market they choose (not true of purchase markets) or agents can still transfer to some extent. (at 5-6, 8). That conspirators still compete in some ways or that victims have some alternative has never excused an agreement not to compete. *United States v. Consolidated Laundries Corp.*, 291 F.2d 563, 575 (2d Cir. 1961)(old customers versus new customers). In *Blackburn v. Sweeney*, 53 F.3d 825 (7th Cir. 1995), an agreement not to compete in advertising was illegal *per se* even though competition in all other areas remained.

3. Respondent contends that an allocation of accounts is not illegal *per se* without a division of geographic markets. (at 8). This Court, at the Solicitor General's urging, rejected a similar radical attempt when it summarily reversed in *Palmer*. The Court reaffirmed that splitting a market is *per se* illegal without showing that a particular geographic market is divided among actual competitors. The circuit courts have repeatedly upheld civil and criminal judgments for dividing accounts without respect to any particular markets. *See* cases cited at Pet. Mem. 16.

4. Respondent contends that since general agents all market NML products, this is an intrabrand case, and normal *per se* rules do not apply.[8] While intrabrand cooperation to advance

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pertinent here and declined to address further issues as premature until further facts were developed. Respondent misstates *Consultants & Designers, Inc. v. Butler Serv. Group, Inc.*, 720 F.2d 1553, 1560 (11th Cir. 1983). It did not involve an agreement between two competitors, but rather a competitor trying to prevent an employer from enforcing a restrictive covenant against an employee and a hiring agency.

[8]In fact, although agents must give NML the right of first refusal, once they do, they are free to and actually do market the products of other carriers.